

STATE OF MICHIGAN
COURT OF APPEALS

TABITHA TYREE,

Plaintiff-Appellant,

v

KESHWAN AMOR, SR.,

Defendant-Appellee.

UNPUBLISHED

September 17, 2009

No. 290634

Wayne Circuit Court

Family Division

LC No. 08-153578-DS

Before: Donofrio, P.J., and Wilder and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right the order of the trial court granting joint legal and physical custody of the minor child to plaintiff and defendant, and awarding primary physical custody to defendant. We affirm.

I. Established Custodial Environment

Plaintiff first argues that the trial court erred in concluding that there was an established custodial environment for the child with defendant; rather, plaintiff contends that an established custodial environment existed with her. We disagree. In *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000), this Court set forth the applicable standards of review in child custody cases as follows:

We apply three standards of review in custody cases. The great weight of the evidence standard applies to all findings of fact. A trial court's findings regarding the existence of an established custodial environment and regarding each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction. An abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions. Questions of law are reviewed for clear legal error. A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law.

MCL 722.27(1)(c) provides, in pertinent part:

The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered.

The Michigan Supreme Court explained that an established custodial environment is “a custodial relationship of a significant duration in which [the child is] provided the parental care, discipline, love, guidance and attention appropriate to his age and individual needs; an environment in both the physical and psychological sense in which the relationship between the custodian and the child is marked by qualities of security, stability and permanence.” *Berger v Berger*, 277 Mich App 700, 766; 747 NW2d 336 (2008), quoting *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981).

The trial court found that the established custodial environment was with defendant. We cannot conclude that “the evidence clearly preponderates in the opposite direction.” *Phillips, supra* at 20. The trial court explained the rationale underlying its finding, that an established custodial relationship existed between the child and defendant, as follows:

The custodial environment of the child, it appears that the parties were sharing parenting time with the child equally up until September of 2007 where the child then resided with the father during the school week and the mother on the week-end.

Then for June of 2008 and July, they alternated weeks. And since the end of July of 2008 to present, the child has been with the father.

Defendant testified as follows, in response to questions from the trial court:

Q. And what was the history of the parenting time between you and the child?

A. Prior to him going to school, we split the week and every other weekend. As he started school, he stayed with me every, like during the week and with his mom on the weekend.

Q. So in September, 2007, he was with you during the week and mom on the weekend?

A. Yes, ma'am.

Q. And then what – and in the summer?

A. In the summer of 2008, he, we alternated weeks.

Q. And then what happened – what happened in July?

A. July, I relocated to Georgia.

Q. Did you have the mom's permission?

A. No.

This testimony demonstrates that the trial court's determination, that an established custodial environment existed with defendant, was based upon record evidence. Conversely, in her brief, plaintiff argues for the first time, without citation to any evidence, that she was in fact the primary custodial parent for most of the five years of the child's life. In addition, we observe that the record, including the hearing transcript and the Family Assessment Mediation Evaluation ("FAME") report that was admitted into evidence, does not reveal that plaintiff claimed that she was the primary custodial parent. The family counselor did observe that before the child began his academic career, plaintiff and defendant shared custody of the child, and evidence that plaintiff was the primary custodial parent is absent from the record. Accordingly, we conclude that the trial court's determination that an established custodial environment existed between the child and defendant was based upon record evidence, and in the absence of any evidence to the contrary, the evidence does not clearly preponderate in the opposite direction. *Phillips, supra* at 20.

II. Best Interest Factors

Plaintiff next argues that the trial court's findings and conclusions with respect to the statutory factors set forth under MCL 722.23, upon which the trial court relied in awarding primary custody of the child to defendant, were against the great weight of the evidence. We disagree.

In child custody cases, the trial court must ascertain the best interest of the child by performing an analysis using the factors set forth under MCL 722.23. *Foskett v Foskett*, 247 Mich App 1, 9; 634 NW2d 363 (2001). The trial court must consider and explicitly articulate its findings and conclusions regarding each factor under MCL 722.23. *Bowers v Bowers*, 190 Mich App 51, 55; 475 NW2d 394 (1991).

MCL 722.23 provides:

As used in this act, "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:

(a) The love, affection, and other emotional ties existing between the parties involved and the child.

(b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.

(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

- (g) The mental and physical health of the parties involved.
- (h) The home, school, and community record of the child.
- (i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.
- (j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.
- (k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.
- (l) Any other factor considered by the court to be relevant to a particular child custody dispute.

The trial court properly articulated its findings and conclusions with respect to each factor under MCL 722.23. Plaintiff, on appeal, does not dispute the trial court's findings with respect to factors (a), (b), (e), (f), (i), and (k). Plaintiff does dispute the trial court's findings and conclusions with respect to factors (c), (d), (g), (h), and (j). With respect to factor (c), "[t]he capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs," the trial court concluded that, "[t]his factor is favorable to both." MCL 722.23(c). Plaintiff argues that this factor was slightly favorable to her because her employment history and income was more "stable." However, we cannot conclude that the evidence "clearly preponderates in the opposite direction" of the trial court's finding that the factor favored both plaintiff and defendant. *Phillips, supra* at 20. We observe that plaintiff fails to factually support her contention that her income and employment history is "more stable," and further observe that the family counselor reported that plaintiff returned to work in March of 2008, following a two-year layoff. Further, we observe that defendant testified that he worked as a full-time dental assistant, was paid \$12 per hour, had medical insurance, and was able to provide the child with food, clothing and medical care. Because plaintiff cannot demonstrate that the evidence clearly preponderates in the opposite direction, we affirm the trial court's finding and conclusion with respect to factor (c). *Phillips, supra* at 20.

Plaintiff next disputes the trial court's finding and conclusion regarding factor (d). Factor (d) addresses, "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." MCL 722.23(d). The trial court concluded, "this factor favors the father in maintaining continuity." Plaintiff argues, again without evidentiary support, that the trial court's finding and conclusion was erroneous because "the minor child primarily lived with [plaintiff] for the first [four and one-half] years of his life." However, the trial court's finding and conclusion are supported by defendant's testimony that defendant intended to reside in Georgia for the foreseeable future, and was engaged to his girlfriend. Plaintiff, in failing to provide evidentiary support, cannot demonstrate with bare unsupported allegations that evidence clearly preponderates in the opposite direction of the trial court's finding and conclusion with respect to factor (d). *Phillips, supra* at 20. Accordingly, plaintiff's argument lacks merit.

Plaintiff next contests the trial court's finding and conclusion with respect to factor (g). Factor (g) addresses, "[t]he mental and physical health of the parties involved." MCL 722.23(g). The trial court acknowledged that defendant threatened to commit suicide in 2004 and 2006, but

concluded that the factor favored neither plaintiff nor defendant. Plaintiff argues that in light of defendant's previous suicidal threats and history of domestic violence, and the absence of evidence that she had suffered mental problems, the trial court should have concluded that this factor favored plaintiff. Plaintiff fails to demonstrate that the evidence clearly preponderates in the opposite direction. *Phillips, supra* at 20. The trial court, in its analysis, observed that both plaintiff and defendant claimed "to have good mental health," and further observed that "there was no actual [suicide] attempt," and noted defendant's testimony that his threat "was not serious." Further, contrary to plaintiff's contention that there was no evidence to impugn her mental health, the family counselor, in the FAME report, observed that plaintiff "reported she was arrested for felonious assault with a knife against the father of her oldest son in 2000." Although we acknowledge that multiple suicide threats and history of domestic violence can imply mental health concerns, we cannot conclude that the evidence clearly preponderates in opposition to the trial court's finding and conclusion that factor (g) favored neither plaintiff nor defendant. *Phillips, supra* at 20.

Plaintiff next argues that the trial court erred in finding and concluding that factor (h) favored defendant. Factor (h) addresses, "[t]he home, school, and community record of the child." MCL 722.23(h). The trial court found that the child is doing well academically, and defendant had enrolled the child in school "in the appropriate level." According to plaintiff, "both parents participated in the education of the minor child." Plaintiff argues that this "Court should conclude that the child, in his best interest, remain in Michigan." In presenting her conclusory argument without reference to evidence, plaintiff misapprehends the standard of review with respect to this issue, and cannot demonstrate that the evidence clearly preponderates in her favor. *Phillips, supra* at 20.

Plaintiff next asserts that the trial court erred in concluding that factor (j) favored both plaintiff and defendant. Factor (j) addresses, "[t]he willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents." MCL 722.23(j). The trial court expressed its concern regarding the fact that defendant moved himself and the child to Georgia without plaintiff's knowledge or consent. However, the trial court also acknowledged that plaintiff and defendant each indicated willingness to allow parenting time with the other parent, and stated, "I believe that both would in the future facilitate the relationship with the other parent," and concluded that "this factor favors both."

We cannot conclude that the evidence clearly preponderates in the opposite direction of the trial court's finding and conclusion that each party would encourage a close and continuing parent-child relationship between the child and the other parent. *Phillips, supra* at 20. The trial court observed that defendant indicated his willingness to allow plaintiff to visit, but that plaintiff refused to contribute to the transportation costs. Because plaintiff cannot show that the evidence clearly preponderates in the opposite direction of the trial court's finding and conclusion that each party would encourage a close and continuing parent-child relationship between the child and the other parent, her argument fails. *Id.*

Plaintiff has failed to demonstrate that the trial court erred in its findings and conclusions with respect to the "best interest of the child" factors under MCL 722.23. The trial court properly applied the correct standard, and, as explained herein, the trial court's findings and conclusions were not against the great weight of the evidence. *Foskett, supra* at 9.

Affirmed.

/s/ Pat M. Donofrio
/s/ Kurtis T. Wilder
/s/ Donald S. Owens